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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

11 SECURITIES AND EXCHANGE COMMISSION,  
12 Plaintiff,  
13 vs.  
14 BENJA INCORPORATED and ANDREW J.  
15 CHAPIN,  
16 Defendants.

**~~[PROPOSED]~~ STIPULATED  
PROTECTIVE ORDER**

Case No. 4:20-cv-08238-JSW

1. **PURPOSES AND LIMITATIONS**

2. Disclosure and discovery activity in this action are likely to involve production of  
3 confidential, proprietary, or private information for which special protection from public  
4 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.  
5 Accordingly, the Securities and Exchange Commission (“SEC”), Andrew J. Chapin, and Kyle  
6 Everett as Chapter 7 Trustee for Benja Incorporated (the “Parties”) hereby stipulate to and  
7 petition the court to enter the following Stipulated Protective Order. The Parties acknowledge  
8 that this Order does not confer blanket protections on all disclosures or responses to discovery  
9 and that the protection it affords from public disclosure and use extends only to the limited  
10 information or items that are entitled to confidential treatment under the applicable legal  
11 principles. The Parties further acknowledge, as set forth in Section 12.3, below, that this

1 Stipulated Protective Order does not entitle them to file confidential information under seal;  
2 Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will  
3 be applied when a party seeks permission from the court to file material under seal.

4 2. DEFINITIONS

5 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
6 information or items under this Order.

7 2.2 “CONFIDENTIAL PER P.O.”: information or items (regardless of how  
8 generated, stored or maintained) or tangible things that qualify for protection under Federal  
9 Rule of Civil Procedure 26(c).

10 2.3 Counsel: counsel (as well as their support staff).

11 2.3 Designating Party: a Party or Non-Party that designates information or items  
12 that it produces in disclosures or in responses to discovery as “CONFIDENTIAL PER P.O.”

13 2.4 Disclosure or Discovery Material: all items or information, regardless of the  
14 medium or manner in which it is generated, stored, or maintained (including, among other  
15 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures  
16 or responses to discovery in this matter.

17 2.5 Expert: a person with specialized knowledge or experience in a matter pertinent  
18 to the litigation who has been retained by a Party or its Counsel to serve as an expert witness or  
19 as a consultant in this action.

20 2.6 Non-Party: any natural person, partnership, corporation, association, or other  
21 legal entity not named as a Party to this action.

22 2.7 Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
23 Material in this action.

24 2.8 Professional Vendors: persons or entities that provide litigation support services  
25 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
26 organizing, storing, or retrieving data in any form or medium) and their employees and  
27 subcontractors.

1        2.9    Protected Material: any Disclosure or Discovery Material that is designated as  
2 "CONFIDENTIAL PER P.O."

3        2.10    Receiving Party: a Party that receives Disclosure or Discovery Material from a  
4 Producing Party.

5        3.      SCOPE

6        The protections conferred by this Stipulation and Order cover not only Protected Material  
7 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
8 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
9 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
10 However, the protections conferred by this Stipulation and Order do not cover the following  
11 information: (a) any information that is in the public domain at the time of disclosure to a  
12 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a  
13 result of publication not involving a violation of this Order, including becoming part of the public  
14 record through trial or otherwise; and (b) any information known to the Receiving Party prior to  
15 the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained  
16 the information lawfully and under no obligation of confidentiality to the Designating Party. Any  
17 use of Protected Material at trial shall be governed by a separate agreement or order.

18        4.      DURATION

19        Even after final disposition of this litigation, the confidentiality obligations imposed by this  
20 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order  
21 otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims and  
22 defenses in this action, with or without prejudice; and (2) final judgment herein, and the  
23 completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,  
24 including the time limits for filing any motions or applications for extension of time pursuant to  
25 applicable law.

26        5.      DESIGNATING PROTECTED MATERIAL

27        5.1      Exercise of Restraint and Care in Designating Material for Protection. Each Party  
28 or Non-Party that designates information or items for protection under this Order must take care to

1 limit any such designation to specific material that qualifies under the appropriate standards. The  
 2 Designating Party must designate for protection only those parts of material, documents, items, or  
 3 oral or written communications that qualify – so that other portions of the material, documents,  
 4 items, or communications for which protection is not warranted are not swept unjustifiably within  
 5 the ambit of this Order.

6 Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
 7 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
 8 unnecessarily encumber or retard the case development process or to impose unnecessary expenses  
 9 and burdens on other parties) expose the Designating Party to sanctions.

10 If it comes to a Designating Party's attention that information or items that it designated for  
 11 protection do not qualify for protection, that Designating Party must promptly notify all other  
 12 Parties that it is withdrawing the mistaken designation.

13       5.2     Manner and Timing of Designations. Except as otherwise provided in this Order  
 14 (*see, e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
 15 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
 16 designated before the material is disclosed or produced.

17       Designation in conformity with this Order requires:

18       (a) for information in documentary form (e.g., paper or electronic documents, but  
 19 excluding transcripts of depositions or other pretrial or trial proceedings), that the  
 20 Producing Party affix the legend “CONFIDENTIAL PER P.O.” to each page that contains  
 21 protected material. If only a portion or portions of the material on a page qualifies for  
 22 protection, the Producing Party also must clearly identify the protected portion(s) (e.g., by  
 23 making appropriate markings in the margins). Information in documentary form that has  
 24 previously been stamped “CONFIDENTIAL,” or “CONFIDENTIAL PER F.O.I.A.,” or  
 25 similarly designated in a production to the SEC during its investigation that preceded the  
 26 filing of this case, is not deemed “CONFIDENTIAL PER P.O.”

27       A Party or Non-Party that makes original documents or materials available for  
 28 inspection need not designate them for protection until after the inspecting Party has

1 indicated which material it would like copied and produced. During the inspection and  
2 before the designation, all of the material made available for inspection shall be deemed  
3 “CONFIDENTIAL PER P.O.” After the inspecting Party has identified the documents it  
4 wants copied and produced, the Producing Party must determine which documents, or  
5 portions thereof, qualify for protection under this Order. Then, before producing the  
6 specified documents, the Producing Party must affix the “CONFIDENTIAL PER P.O.”  
7 legend to each page that contains Protected Material. If only a portion or portions of the  
8 material on a page qualifies for protection, the Producing Party also must clearly identify  
9 the protected portion(s) (e.g., by making appropriate markings in the margins).

10 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
11 Designating Party identify on the record, before the close of the deposition, hearing, or  
12 other proceeding, all protected testimony.

13 (c) for information produced in some form other than documentary and for any other  
14 tangible items, that the Producing Party affix in a prominent place on the exterior of the  
15 container or containers in which the information or item is stored the legend  
16 “CONFIDENTIAL PER P.O.” If only a portion or portions of the information or item  
17 warrant protection, the Producing Party, to the extent practicable, shall identify the  
18 protected portion(s).

19 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
20 designate qualified information or items does not, standing alone, waive the Designating Party’s  
21 right to secure protection under this Order for such material. Upon timely correction of a  
22 designation, the Receiving Party must make reasonable efforts to assure that the material is treated  
23 in accordance with the provisions of this Order.

24 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

25 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of  
26 confidentiality at any time. Unless a prompt challenge to a Designating Party’s confidentiality  
27 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic  
28 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to

1 challenge a confidentiality designation by electing not to mount a challenge promptly after the  
2 original designation is disclosed.

3       6.2     Meet and Confer. The Challenging Party shall initiate the dispute resolution  
4 process by providing written notice of each designation it is challenging and describing the basis  
5 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice  
6 must recite that the challenge to confidentiality is being made in accordance with this specific  
7 paragraph of the Protective Order. The Parties shall attempt to resolve each challenge in good faith  
8 and must begin the process by conferring directly (in voice to voice dialogue; other forms of  
9 communication are not sufficient) within 14 days of the date of service of notice. In conferring, the  
10 Challenging Party must explain the basis for its belief that the confidentiality designation was not  
11 proper and must give the Designating Party an opportunity to review the designated material, to  
12 reconsider the circumstances, and, if no change in designation is offered, to explain the basis for  
13 the chosen designation. A Challenging Party may proceed to the next stage of the challenge  
14 process only if it has engaged in this meet and confer process first or establishes that the  
15 Designating Party is unwilling to participate in the meet and confer process in a timely manner.

16       6.3     Judicial Intervention. If the Parties cannot resolve a challenge without court  
17 intervention, the Designating Party shall file and serve a motion to retain confidentiality under  
18 Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of  
19 the initial notice of challenge or within 14 days of the Parties agreeing that the meet and confer  
20 process will not resolve their dispute, whichever is earlier. Each such motion must be accompanied  
21 by a competent declaration affirming that the movant has complied with the meet and confer  
22 requirements imposed in the preceding paragraph. Failure by the Designating Party to make such a  
23 motion including the required declaration within 21 days (or 14 days, if applicable) shall  
24 automatically waive the confidentiality designation for each challenged designation. In addition,  
25 the Challenging Party may file a motion challenging a confidentiality designation at any time if  
26 there is good cause for doing so, including a challenge to the designation of a deposition transcript  
27 or any portions thereof. Any motion brought pursuant to this provision must be accompanied by a  
28

1 competent declaration affirming that the movant has complied with the meet and confer  
 2 requirements imposed by the preceding paragraph.

3 The burden of persuasion in any such challenge proceeding shall be on the Designating  
 4 Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose  
 5 unnecessary expenses and burdens on other parties) may expose the Challenging Party to  
 6 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to file  
 7 a motion to retain confidentiality as described above, all parties shall continue to afford the  
 8 material in question the level of protection to which it is entitled under the Producing Party's  
 9 designation until the court rules on the challenge.

10 7. ACCESS TO AND USE OF PROTECTED MATERIAL

11 7.1 Basic Principles. Except as described herein, a Receiving Party may use Protected  
 12 Material that is disclosed or produced by another Party or by a Non-Party in connection with this  
 13 case only for prosecuting, defending, or attempting to settle this litigation. Such Protected Material  
 14 may be disclosed only to the categories of persons and under the conditions described in this  
 15 Order. When the litigation has been terminated, a Receiving Party must comply with the  
 16 provisions of section 13 below (FINAL DISPOSITION). In addition to and notwithstanding the  
 17 permitted disclosures set forth above (and in 7.2, below), the SEC may use the Protected Material  
 18 consistent with the "Routine Uses of Information" set forth in SEC Form 1662 (a copy of which is  
 19 attached hereto as Exhibit B).

20 Protected Material must be stored and maintained by a Receiving Party at a location and in  
 21 a secure manner that ensures that access is limited to the persons authorized under this Order.

22 7.2 Disclosure of Protected Information or Items. Unless otherwise ordered by the  
 23 court or permitted in writing by the Designating Party, a Receiving Party may disclose any  
 24 information or item designated "CONFIDENTIAL PER P.O." only to:

25 (a) the Receiving Party's Counsel;

26 (b) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
 27 reasonably necessary for this litigation and who have signed the "Acknowledgment and  
 28 Agreement to Be Bound" (Exhibit A);

- (c) the court and its personnel;
- (d) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation;
- (e) any witness (and their Counsel) who counsel for a Party in good faith believes may be called to testify at a trial or deposition in this action. If this disclosure is made in deposition, pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order;
- (g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
OTHER LITIGATION

If a Party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as "CONFIDENTIAL PER P.O.," that Party must:

(a) promptly notify in writing the Designating Party. Such notification shall include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Stipulated Protective Order; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL PER P.O.” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these

1 provisions should be construed as authorizing or encouraging a Receiving Party in this action to  
2 disobey a lawful directive from another court.

3       9.       A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED  
4                   IN THIS LITIGATION

5       (a) The terms of this Order are applicable to information produced by a Non-Party in this  
6                   action and designated as "CONFIDENTIAL PER P.O." Such information produced by  
7                   Non-Parties in connection with this litigation is protected by the remedies and relief  
8                   provided by this Order. Nothing in these provisions should be construed as prohibiting a  
9                   Non-Party from seeking additional protections.

10      (b) In the event that a Party is required, by a valid discovery request, to produce a Non-  
11                   Party's confidential information in its possession, and the Party is subject to an agreement  
12                   with the Non-Party not to produce the Non-Party's confidential information, then the Party  
13                   shall:

14                   (1) promptly notify in writing the Requesting Party and the Non-Party that some or  
15                   all of the information requested is subject to a confidentiality agreement with a  
16                   Non-Party;

17                   (2) promptly provide the Non-Party with a copy of the Stipulated Protective Order  
18                   in this litigation, the relevant discovery request(s), and a reasonably specific  
19                   description of the information requested; and

20                   (3) make the information requested available for inspection by the Non-Party.

21      (c) If the Non-Party fails to object or seek a protective order from this court within 14 days  
22                   of receiving the notice and accompanying information, the Receiving Party may produce  
23                   the Non-Party's confidential information responsive to the discovery request. If the Non-  
24                   Party timely seeks a protective order, the Receiving Party shall not produce any  
25                   information in its possession or control that is subject to the confidentiality agreement with  
26                   the Non-Party before a determination by the court. Absent a court order to the contrary, the  
27                   Non-Party shall bear the burden and expense of seeking protection in this court of its  
28                   Protected Material.

10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE  
PROTECTED MATERIAL

When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the Parties reach an agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection, the Parties may incorporate their agreement in the stipulated protective order submitted to the court.

## 12. MISCELLANEOUS

12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

1       12.3   Filing Protected Material. Without written permission from the Designating Party  
2 or a court order secured after appropriate notice to all interested persons, a Party may not file in the  
3 public record in this action any Protected Material. A Party that seeks to file under seal any  
4 Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed  
5 under seal pursuant to a court order authorizing the sealing of the specific Protected Material at  
6 issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing  
7 that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled  
8 to protection under the law. If a Receiving Party's request to file Protected Material under seal  
9 pursuant to Civil Local Rule 79-5(d) is denied by the court, then the Receiving Party may file the  
10 information in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed  
11 by the court.

12       13.    FINAL DISPOSITION

13       Within 60 days after the final disposition of this action, as defined in paragraph 4, each  
14 Receiving Party must return all Protected Material to the Producing Party or destroy such material,  
15 except as noted herein with respect to the SEC's records retention requirements. As used in this  
16 subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and  
17 any other format reproducing or capturing any of the Protected Material. If the Protected Material  
18 is returned or destroyed, the Receiving Party must submit a written certification to the Producing  
19 Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that  
20 (1) identifies (by category, where appropriate) all the Protected Material that was returned or  
21 destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts,  
22 compilations, summaries or any other format reproducing or capturing any of the Protected  
23 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all  
24 pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda,  
25 correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant  
26 and expert work product, even if such materials contain Protected Material. Any such archival  
27 copies that contain or constitute Protected Material remain subject to this Protective Order as set  
28 forth in paragraph 4 (DURATION). Notwithstanding this provision, nothing in this Stipulated

1 Protective Order should be read as altering the SEC's policies or procedures regarding record  
2 retention as approved by the National Archives and Records Administration; to the extent the  
3 obligations under this Order may conflict with those policies or procedures, the SEC will adhere to  
4 its record retention policies and procedures and in doing so will not be deemed to be acting  
5 contrary to this Order.

6 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

7 DATED: April 12, 2021 /s/ Matthew Meyerhofer  
8 Matthew Meyerhofer  
9 Attorney for Plaintiff  
SECURITIES AND EXCHANGE COMMISSION

10 /s/ Randy Sue Pollock  
11 Randy Sue Pollock  
12 LAW OFFICES OF RANDY SUE POLLOCK  
13 Attorney for Defendant Andrew Chapin

14 /s/ Stephen Finestone  
15 Stephen Finestone  
16 FINESTONE HAYES LLP  
17 Attorney for A. Kyle Everett, Chapter 7 Liquidating  
18 Trustee of Benja Incorporated

19 PURSUANT TO STIPULATION, IT IS SO ORDERED.

20 DATED: April 13, 2021

21   
22 United States District ~~or~~ Magistrate Judge

EXHIBIT A

## ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or  
4 type full address], declare under penalty of perjury that I have read in its entirety and understand  
5 the Stipulated Protective Order that was issued by the United States District Court for the  
6 Northern District of California on [date] in the case of *SEC v. Benja Incorporated and Andrew J.*  
7 *Chapin*, Case No. 4:20-cv-08238-JSW. I agree to comply with and to be bound by all the terms of  
8 this Stipulated Protective Order and I understand and acknowledge that failure to so comply could  
9 expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will  
10 not disclose in any manner any information or item that is subject to this Stipulated Protective  
11 Order to any person or entity except in strict compliance with the provisions of this Order.  
12 I further agree to submit to the jurisdiction of the United States District Court for the Northern  
13 District of California for the purpose of enforcing the terms of this Stipulated Protective Order,  
14 even if such enforcement proceedings occur after termination of this action.

15 I hereby appoint \_\_\_\_\_ [print or type full name] of  
16 \_\_\_\_\_ [print or type full address and telephone number]  
17 as my California agent for service of process in connection with this action or any proceedings  
18 related to enforcement of this Stipulated Protective Order.

20 | Date:

21 City and State where sworn and signed:

23 Printed name:

25 | Signature:

**EXHIBIT B**

**SEC FORM 1662**

**SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**Supplemental Information for Persons Requested to Supply  
Information Voluntarily or Directed to Supply Information  
Pursuant to a Commission Subpoena**

**A. False Statements and Documents**

Section 1001 of Title 18 of the United States Code provides that fines and terms of imprisonment may be imposed upon:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

Section 1519 of Title 18 of the United States Code provides that fines and terms of imprisonment may be imposed upon:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . ., or in relation to or contemplation of any such matter.

**B. Testimony**

If your testimony is taken, you should be aware of the following:

1. *Record.* Your testimony will be transcribed by a reporter. If you desire to go off the record, please indicate this to the Commission employee taking your testimony, who will determine whether to grant your request. The reporter will not go off the record at your, or your counsel's, direction.
2. *Counsel.* You have the right to be accompanied, represented and advised by counsel of your choice. Your counsel may advise you before, during and after your testimony; question you briefly at the conclusion of your testimony to clarify any of the answers you give during testimony; and make summary notes during your testimony solely for your use. If you are accompanied by counsel, you may consult privately.

If you are not accompanied by counsel, please advise the Commission employee taking your testimony if, during the testimony, you desire to be accompanied, represented and advised by counsel. Your testimony will be adjourned once to afford you the opportunity to arrange to be so accompanied, represented or advised.

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

3. *Transcript Availability.* Rule 6 of the Commission's Rules Relating to Investigations, 17 CFR 203.6, states:

A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however, That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.*

If you wish to purchase a copy of the transcript of your testimony, the reporter will provide you with a copy of the appropriate form. Persons requested to supply information voluntarily will be allowed the rights provided by this rule.

4. *Perjury.* Section 1621 of Title 18 of the United States Code provides that fines and terms of imprisonment may be imposed upon:

Whoever--

- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify

truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true.

5. *Fifth Amendment and Voluntary Testimony.* Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency.

You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you.

If your testimony is not pursuant to subpoena, your appearance to testify is voluntary, you need not answer any question, and you may leave whenever you wish. Your cooperation is, however, appreciated.

6. *Formal Order Availability.* If the Commission has issued a formal order of investigation, it will be shown to you during your testimony, at your request. If you desire a copy of the formal order, please make your request in writing.

### **C. Submissions and Settlements**

Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(c), states:

Persons who become involved in . . . investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director or Regional Director with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

The staff of the Commission routinely seeks to introduce submissions made pursuant to Rule 5(c) as evidence in Commission enforcement proceedings, when the staff deems appropriate.

Rule 5(f) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(f), states:

In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

### **D. Freedom of Information Act**

The Freedom of Information Act, 5 U.S.C. 552 (the "FOIA"), generally provides for disclosure of information to the public. Rule 83 of the Commission's Rules on Information and Requests, 17 CFR 200.83, provides a procedure by which a person can make a written request that information submitted to the Commission not be disclosed under the FOIA. That rule states that no determination as to the validity of such a request will be made until a request for disclosure of the information under the FOIA is received. Accordingly, no response to a request that information not be disclosed under the FOIA is necessary or will be given until a request for disclosure under the FOIA is received. If you desire an acknowledgment of receipt of your written request that information not be disclosed under the FOIA, please provide a duplicate request, together with a stamped, self-addressed envelope.

#### **E. Authority for Solicitation of Information**

*Persons Directed to Supply Information Pursuant to Subpoena.* The authority for requiring production of information is set forth in the subpoena. Disclosure of the information to the Commission is mandatory, subject to the valid assertion of any legal right or privilege you might have.

*Persons Requested to Supply Information Voluntarily.* One or more of the following provisions authorizes the Commission to solicit the information requested: Sections 19 and/or 20 of the Securities Act of 1933; Section 21 of the Securities Exchange Act of 1934; Section 321 of the Trust Indenture Act of 1939; Section 42 of the Investment Company Act of 1940; Section 209 of the Investment Advisers Act of 1940; and 17 CFR 202.5. Disclosure of the requested information to the Commission is voluntary on your part.

#### **F. Effect of Not Supplying Information**

*Persons Directed to Supply Information Pursuant to Subpoena.* If you fail to comply with the subpoena, the Commission may seek a court order requiring you to do so. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court. In addition, Section 21(c) of the Securities Exchange Act of 1934, Section 42(c) of the Investment Company Act of 1940, and Section 209(c) of the Investment Advisers Act of 1940 provide that fines and terms of imprisonment may be imposed upon any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records in compliance with the subpoena.

*Persons Requested to Supply Information Voluntarily.* There are no direct sanctions and thus no direct effects for failing to provide all or any part of the requested information.

#### **G. Principal Uses of Information**

The Commission's principal purpose in soliciting the information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which the Commission has enforcement authority, such as rules of securities exchanges and the rules of the Municipal Securities Rulemaking Board. Facts developed may, however, constitute violations of other laws or rules. Information provided may be used in Commission and other agency enforcement proceedings. Unless the Commission or its staff explicitly agrees to the contrary in writing, you should not assume that the Commission or its staff acquiesces in, accedes to, or concurs or agrees with, any position, condition, request, reservation of right, understanding, or any other statement that purports, or may be deemed, to be or to reflect a limitation upon the Commission's receipt, use, disposition, transfer, or retention, in accordance with applicable law, of information provided.

#### **H. Routine Uses of Information**

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the SEC has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the SEC or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the SEC's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.
2. To other federal, state, local, or foreign law enforcement agencies; securities self-regulatory organizations; and foreign financial regulatory authorities to assist in or coordinate regulatory or law enforcement activities with the SEC.
3. To national securities exchanges and national securities associations that are registered with the SEC, the Municipal Securities Rulemaking Board; the Securities Investor Protection Corporation; the Public Company Accounting Oversight Board; the federal banking authorities, including, but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; state securities regulatory agencies or organizations; or regulatory authorities of a foreign government in connection with their regulatory or enforcement responsibilities.
4. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.
5. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present members of its staff, is a party or otherwise involved in an official capacity.

6. In connection with proceedings by the Commission pursuant to Rule 102(e) of its Rules of Practice, 17 CFR 201.102(e).
7. To a bar association, state accountancy board, or other federal, state, local, or foreign licensing or oversight authority; or professional association or self-regulatory authority to the extent that it performs similar functions (including the Public Company Accounting Oversight Board) for investigations or possible disciplinary action.
8. To a federal, state, local, tribal, foreign, or international agency, if necessary to obtain information relevant to the SEC's decision concerning the hiring or retention of an employee; the issuance of a security clearance; the letting of a contract; or the issuance of a license, grant, or other benefit.
9. To a federal, state, local, tribal, foreign, or international agency in response to its request for information concerning the hiring or retention of an employee; the issuance of a security clearance; the reporting of an investigation of an employee; the letting of a contract; or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.
10. To produce summary descriptive statistics and analytical studies, as a data source for management information, in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies; may also be used to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act.
11. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction, or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)) or pursuant to the Commission's Rules of Practice, 17 CFR 201.100 – 900 or the Commission's Rules of Fair Fund and Disgorgement Plans, 17 CFR 201.1100-1106, or otherwise, where such trustee, receiver, master, special counsel, or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice or the Rules of Fair Fund and Disgorgement Plans.
12. To any persons during the course of any inquiry, examination, or investigation conducted by the SEC's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.
13. To interns, grantees, experts, contractors, and others who have been engaged by the Commission to assist in the performance of a service related to this system of records and who need access to the records for the purpose of assisting the Commission in the efficient administration of its programs, including by performing clerical, stenographic, or data analysis functions, or by reproduction of records by electronic or other means. Recipients of these records shall be required to comply with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a.
14. In reports published by the Commission pursuant to authority granted in the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), which authority shall include, but not be limited to, section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a)).
15. To members of advisory committees that are created by the Commission or by Congress to render advice and recommendations to the Commission or to Congress, to be used solely in connection with their official designated functions.
16. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 to 200.735-18, and who assists in the investigation by the Commission of possible violations of the federal securities laws (as such term is defined in section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(47)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.
17. To a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.
18. To members of Congress, the press, and the public in response to inquiries relating to particular Registrants and their activities, and other matters under the Commission's jurisdiction.
19. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78c(a)(47)), as amended.
20. To respond to subpoenas in any litigation or other proceeding.
21. To a trustee in bankruptcy.

22. To any governmental agency, governmental or private collection agent, consumer reporting agency or commercial reporting agency, governmental or private employer of a debtor, or any other person, for collection, including collection by administrative offset, federal salary offset, tax refund offset, or administrative wage garnishment, of amounts owed as a result of Commission civil or administrative proceedings.

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*Small Business Owners:* The SEC always welcomes comments on how it can better assist small businesses. If you would like more information, or have questions or comments about federal securities regulations as they affect small businesses, please contact the Office of Small Business Policy, in the SEC's Division of Corporation Finance, at 202-551-3460. If you would prefer to comment to someone outside of the SEC, you can contact the Small Business Regulatory Enforcement Ombudsman at <http://www.sba.gov/ombudsman> or toll free at 888-REG-FAIR. The Ombudsman's office receives comments from small businesses and annually evaluates federal agency enforcement activities for their responsiveness to the special needs of small business.